Petition

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In the Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM C. BREWER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the statutory allocation of benefits—the grant or the denial of the right to elect to retain the use and occupancy of property as a condition to its acquisition by the Government—incident to the condemnation of Brewer's property, on the basis of the criterion established by 16 U.S.C. §460w-3—the prior exercise of constitutionally protected activity—operates to deny Brewer equal protection of the law as that concept is encompassed in the Due Process Clause of the Fifth Amendment.

a. as a classification which serves to penalize the prior exercise of fundamental, constitutionally protected rights, or

b. as a classification wholly unrelated to any legitimate governmental purpose.[1]

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[1] *List of other parties.* The only other parties to the consolidated proceedings in the Court of Appeals not listed in the caption are a group of property owners who, like Petitioner, alleged that Congress did not grant condemnation as an authorized means of acquisition. This question is not presented to this Court, and (we understand) will not be presented by such other property owners. The statutory classification created by 16 U.S.C. §460w-3 does not deny the election to retain a right of use and occupancy to such other property owners, and they, therefore, did not present the constitutional question presented here to the Court of Appeals. The names of the other property owners are: Mary Elizabeth Rice, Lisa Ann Wolfson, Katherine Dillard Rice, Frederick Clinton Kaemmer, Julia Loxley Kaemmer, Fred C. Anderson and Katherine B. Andersen.

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In the Supreme Court of the United States

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NO.

WILLIAM C. BREWER,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner William C. Brewer ("Brewer") respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Seventh Circuit entered February 16, 1982.

OPINION BELOW

The Opinion and Judgment of the Court of Appeals, not yet reported, appears in Appendix A to this Petition. The Transcript of the Oral Ruling and Order rendered by the United States District Court for the Western District of Wisconsin on Petitioner's Motion for Summary Judgment appears in Appendix B, and its Memorandum on Petitioner's Motion for Reconsideration appears in Appendix C. That Court's Findings of Fact appear in Appendix D, and its Judgment appears in Appendix E.

JURISDICTION

The Opinion and Judgment of the Court of Appeals for the Seventh Circuit was entered on February 16, 1982. This Petition for a Writ of Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States; Amendment V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Code, Title 16:

> §460w-3. Retention rights of owners of improved property—Designation of lands as administrative site, visitor center, and related facilities; election by owners of term of rights retained; adjustment of compensation
>
> (a) With the exception of not more than eighty acres of land to be designated within the lakeshore boundaries by the Secretary as an administrative site, visitor center, and related facilities, as soon as practicable, any owner or owners of improved property on the date of its acquisition by the Secretary may, as a condition of such acquisition, retain for themselves and their successors or assigns a right of use and occupancy of the improved property for noncommercial residential purposes for a definite term not to exceed twenty-five years, or, in lieu thereof, for a term ending at the death of the owner, or the death of his spouse, whichever is the later. The owner shall elect the term to be reserved. The Secretary shall pay to the owner the fair market value of the property on the date of such acquisition less the fair market value on such date of the right retained by the owner.
>
> • • •

(c) The term "improved property", as used in this section, shall mean a detached, noncommercial residential dwelling, the construction of which was begun before January 1, 1967 (hereinafter referred to as "dwelling"), together with so much of the land on which the dwelling is situated, the said land being in the same ownership as the dwelling, as the Secretary shall designate to be reasonably necessary for the enjoyment of the dwelling for the sole purpose of noncommercial residential use, together with any structures accessory to the dwelling which are situated on the land so designated.

STATEMENT OF THE CASE

Brewer acquired his 16.92 acres of island property on September 5, 1966. On that date, the property was in its unimproved, natural state (App. A at 7; App. D at 20). From September 5, 1966 until July, 1968, Brewer elected to use, enjoy and maintain his property in its unimproved, natural condition (App. D at 20-21). During July, 1968, Brewer commenced the construction of a detached, noncommercial residential dwelling on his property, after which date to the date of the Government's taking Brewer used, enjoyed and maintained for noncommercial residential purposes (App. A at 7; App. D at 21). From September 5, 1966 to the date of the Government's taking, the alternatives selected by Brewer as to the use, enjoyment and maintenance of his island property were in all respects proper, legitimate and lawful (App. D at 21).

Effective September 26, 1970, a date more than 2 years after Brewer commenced construction of a detached, noncommercial residential dwelling on his property, the Apostle Islands National Lakeshore enabling legislation was enacted into law. Pub. L. 91-424, 84 Stat. 880, 16 U.S.C. §§460w *et seq.* As applied to Brewer, the "improved property" classifier established by 16 U.S.C. §460w-3—which grants or denies to acquisition date property owners the right to elect to retain the use and occupancy of their

property—classifies retrospectively by means of a January 1, 1967 cut-off date on the sole basis of the manner in which Brewer chose to use, enjoy and maintain his property prior to January 1, 1967, a date more than 3½ years prior to its enactment on September 26, 1970.

Brewer desires to be classified with, and treated like, property owners to whom 16 U.S.C. §460w-3 grants, as a condition of the Government's acquisition of their property by the power of condemnation, the benefit of an election to retain a right of use and occupancy (App. D at 21). But for the fact that Brewer exercised his freedom of choice and decided to use, enjoy and maintain his property in a given lawful fashion, rather than another—that is, not to improve his property until July, 1968, but to use, enjoy and maintain it in an unimproved state until that date—the "improved property" classifier would entitle Brewer, as a condition of the Government's taking of his property, to elect to retain the 16 U.S.C. §460w-3 right of use and occupancy afforded to other property owners (App. A at 7).

The Government commenced an action in the United States District Court for the Western District of Wisconsin, for the purpose of acquiring, by the power of eminent domain, the fee simple estate in the 16.92 acres of island property owned by Brewer. Brewer's answer to the Government's complaint alleged, *inter alia*, that the proposed taking, and the denial of the 16 U.S.C. §460w-3 benefits incident thereto, was discriminatory in that it denied him equal protection of the law.

Brewer's constitutional challenge on equal protection grounds to the taking of his property, both in the District Court and in the Court of Appeals, focused on the nature of the activity which serves as the basis for determining whether a property owner is either included in or excluded from the class of property owners chosen by Congress for

entitlement to the benefits afforded by the statutory "improved property" classifier. That is, the classifier's use of the manner and timing of Brewer's prior exercise of his constitutionally protected rights in property and to personal liberty, respecting freedom of choice as to the use, enjoyment and maintenance of his property for all proper, legitimate and lawful purposes, free from unwarranted after-the-fact governmental interference, as the solitary ground for denying Brewer the election to retain the 16 U.S.C. §460w-3 right of use and occupancy. Brewer's constitutional attack was two pronged: First, retrospective classification on September 26, 1970 by reference only to the manner and timing of Brewer's wholly lawful exercise of his constitutionally protected rights in property and to personal liberty prior to January 1, 1967, but not at anytime thereafter to September 26, 1970, as the sole allocator of the 16 U.S.C. §460w-3 benefits and burdens, operates to penalize Brewer's prior exercise of fundamental, constitutionally protected rights, and, absent a clear showing that it is necessary to promote or protect a compelling and substantial governmental interest, is unconstitutional as applied to Brewer. Second, classification by means of the naked January 1, 1967 cut-off date is arbitrary and unrelated to any legitimate governmental purpose, and, as applied to Brewer, unconstitutional.

The District Court, although it agreed that Brewer's prior exercise of his personal rights in property is "constitutionally protected", held that the right is not "fundamental" as that adjective has been used, as a word of art, to trigger so-called "strict scrutiny". Rather, it held that "the exercise of the power of eminent domain to create a park falls in the area of economics and social welfare," and the proper test to be applied is the "reasonable basis" test or whether the "means [employed is]

reasonably related to the furtherance of a legitimate governmental purpose (App. C at 18-19). The District Court identified three "reasonable basis" for the after-the-fact classification of Brewer's exercise of his personal rights in property and to personal liberty prior to enactment of the Apostle Islands National Lakeshore legislation by means of the retroactive January 1, 1967 cut-off date: First, identifying property owners who have a sense of attachment for their property and to provide to these property owners an opportunity to have the blow of condemnation softened; second, discouraging property owners from constructing improvements during the pendency of the legislation before Congress and, thereby, preventing speculation and profiteering which might add to the Govment's acquisition costs; and third, promoting administrative convenience prior to the passage of the legislation (App. B at 15-16). The Court of Appeals affirmed, basing its holding on essentially the same grounds advanced by the District Court (App. A at 7-12).

REASONS FOR GRANTING THE WRIT

I.

THE DECISIONS BELOW ARE IN SHARP CONFLICT WITH, INDEED IGNORE, THE LONG-STANDING CONSTITUTIONAL PRINCIPLES PREVIOUSLY ENUNCIATED BY THE DECISIONS OF THIS COURT, RESPECTING CLASSIFICATION BY REFERENCE TO, AND ON THE SOLE BASIS OF, THE MANNER AND TIMING OF THE PRIOR EXERCISE OF CONSTITUTIONALLY PROTECTED ACTIVITY.

At the outset it is highly important that this Court not lose sight of the very narrow question presented. This is because neither the District Court nor the Court of Appeals came to grips with the precise issue presented to them; but instead, addressed a different and legally exclusive question as the foundational support for their holdings. The question is *not* whether "the exercise of the power of eminent domain to create a park falls in the area of economics and social welfare" (App. C at 19); nor whether "the right to enjoy one's property is subject to the legitimate exercise of eminent domain by the government" (App. A at 8).[2] Rather, the precise question pre-

[2] Brewer agrees that rights in property and to personal liberty as to the use, enjoyment and maintenance of property are not absolute (App.A at 8). Nor, however, are the First Amendment freedoms, which the District Court "ranks" a "paramount", limitless (App. B at 14; App. C. at 19). *E.g., Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 209 (1975). Indeed, although courts have shown a special solicitude for the guarantees of the First Amendment, when they collide with the Fifth Amendment rights of private property owners, their "rank" does not always prevail. *E.g., Lloyd Corp.* v. *Tanner*, 407 U.S. 551, 567-68, 570 (1972).

sented is whether the Government, incident to the taking of Brewer's property by means of condemnation, can employ the manner and timing of his prior and wholly lawful exercise of his constitutionally protected personal rights in property and to personal liberty as the sole determinate for classifying him and denying to him the 16 U.S.C. §460w-3 benefits.[3] Although the opinions of the District Court and the Court of Appeals do not address this issue, it is decided by subsumption, and their failure to recognize Brewer's constitutional rights, and protect him from classification solely by reference to his prior exercise of constitutionally protected activity is repugnant to the teachings of this Court.[4]

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[3] Granted, Congress was not required constitutionally to grant the 16 U.S.C. §460w-3 benefits to that certain class of property owners falling within the definition of "improved property". But, having done so, the Constitution does prohibit Congress from denying these same benefits to others, like Brewer, who are similarly situated, but for only the manner and timing of their prior exercise of constitutionally protected rights. Constitutionally protected activity cannot serve as the basis for denying benefits afforded to others. *E.g.*, *Perry* v. *Sindermann*, 408 U.S. 593, 598 (1972).

[4] The statutory schematic setting for the constitutional question presented by Brewer is one of first impression; but is not isolated to Brewer. Given Congress' customary and continuing utilization of variants of the "improved property" classifier as an essential ingredient of the legislative recipe for the acquisition of private property for public use (App. A at 9-11; *e.g.*, Cuyahoga Valley National Recreation Area 16 U.S.C. §§460 ff *et seq.*; Chickasaw National Recreation Area, 16 U.S.C. §§460hh *et seq.*; Chattacoochee River National Recreation Area, 16 U.S.C. §§460ii *et seq.*; Indiana Dunes National Lakeshore, 16 U.S.C. §§460u *et seq.*), the constitutional ramifications of the question posed by Brewer for resolution significantly affect and have continuing consequences for a great number of private property owners, and thus, will have immediate public

(footnote continued)

A. The Statutory Basis for the Classification Established by 16 U.S.C. §460w-3 Operates Retrospectively and Serves to Penalize Brewer's Prior Exercise of Fundamental, Constitutionally Protected Rights; Consequently, Absent a Clear Showing that it is Necessary to Promote or Protect a Compelling and Substantial Governmental Interest, it is Unconstitutional as Applied to Brewer.

Any classification which serves to "*penalize*" the exercise of a constitutionally protected right, unless shown to be necessary to promote or protect a compelling and substantial governmental interest, is unconstitutional. *Dunn* v. *Blumstein*, 405 U.S. 330, 339-41 (1972); *Shapiro* v. *Thompson*, 394 U.S. 618, 634 (1969).

1. Brewer's use and enjoyment of his property was the exercise of fundamental, constitutionally protected rights.

The Fifth Amendment right of private property owners is a fundamental, constitutionally protected right. In *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 552 (1972), this Court declared:

> Property does not have rights. People have rights. The right to enjoy property without unlawful depriva-

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(footnote continued)

importance far beyond their impact on Brewer. Moreover, as evinced by the superficial treatment given this issue in the courts below, resolution by this Court, establishing a framework for striking a constitutional balance between the sovereign power of eminent domain and the protection from retrospective penalization to which the constitutional rights of private property owners are entitled, will allow for the proper development of this important constitutional issue, provide beneficial guidance to the lower courts and is likely to obviate recurring disputes between private property owners and the United States over Congress' use of the "improved property" classifier incident to the ever-increasing acquisitions of private property by the United States for public use.

> tion, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized. J. Locke, Of Civil Government 82-85 (1924); J. Adams, A Defence of the Constitutions of Government of the United States of America, in F. Coker, Democracy, Liberty, and Property 121-132 (1942); 1 W. Blackstone, Commentaries* 138-140.

And as stated in *Fuentes* v. *Shevin*, 407 U.S. 67, 81 (1972):

> . . . the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference.

See also, Prunevard Shopping Center v. *Robins*, 447 U.S. 74 (1980); *Lloyd Corp.* v. *Tanner*, 407 U.S. 551, 570 (1972); *Buchanan* v. *Warley*, 245 U.S. 60, 74-82 (1917); *Chicago, B. & Q. Ry. Co.* v. *Chicago*, 166 U.S. 226, 235-36, 240 (1897); *Wilkinson* v. *Leland*, 27 U.S. 627, 657 (1829); *cf.*, *Payton* v. *New York*, 445 U.S. 573, 596-97 nn. 44, 45 (1980); *Boyd* v. *United States*, 116 U.S. 616, 630 (1886).

This basic personal right in property includes the freedom to use and enjoy property as one sees fit for all lawful and legitimate purposes.[5] *Prunevard Shopping Center* v.

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[5] Freedom of choice as to the use and enjoyment of property also constitutes an exercise of the constitutionally protected right to personal liberty. That is, the freedom to choose how and when rights in property will be exercised. As stated in *Lynch* v. *Household Finance Corp.*, *supra*, "a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other." In *Wilkinson* v. *Leland*, *supra*, this Court emphasized the importance of the rights

(footnote continued)

Robins, supra, at 85 n. 6; *Sterling* v. *Constantin,* 287 U.S. 378, 396 (1932); *Washington ex rel. Seattle Title Trust Co.* v. *Roberge,* 278 U.S. 116, 121 (1928); *Terrace* v. *Thompson,* 263 U.S. 197, 215 (1923); *cf., Moore* v. *East Cleveland,* 431 U.S. 494, 519-21 (1977) (Stevens, J., concurring).

> It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, and own and dispose of property. Equality in the enjoyment of property rights was regarded

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(footnote continued)

to private property and personal liberty as basic to the foundation of our democratic system of government:

> The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred.

Relative to the significance of these interrelated rights, the Supreme Court of Texas, in *Spann* v. *City of Dallas,* 111 Tex. 350, 235 S.W. 513, 515 (1921), stated:

> To secure their property was one of the great ends for which men entered into society. The right to acquire and own property, and to deal with it and use it as the owner chooses, so long as the use harms nobody, is a natural right. It does not owe its origin to constitutions. It existed before them. It is a part of the citizen's natural liberty—an expression of his freedom, guaranteed as inviolate by every American Bill of Rights.
>
> . . .
>
> The ancient and established maxims of Anglo-Saxon law which protect these fundamental rights in the use, enjoyment and disposal of private property, are but the outgrowth of the long and arduous experience of mankind. They embody a painful, tragic history—the record of the struggle against tyranny, the overseeship of prefects and the overlordship of kings and nobles, when nothing so well bespoke the serfdom of the subject as his incapability to own property. They proclaim the freedom of men from those odious despotisms, their liberty to earn and possess their own, to deal with it, to use it and dispose of it, not at the behest of a master, but in the manner that befits free men.

> by the framers of that Amendment as an essential precondition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee. *Lynch* v. *Household Finance Corp., supra.* at 544.

Because the substantial value of property lies in its use and enjoyment, legislation, whether merely pending or enacted, which is designed and serves to penalize these elements of property, destroys property itself. If the freedom of use and enjoyment be chilled, property is stripped of an essential attribute, the value of property is annihilated, and ownership is reduced to a barren right.

True, the dominion over property springing from ownership is not absolute; the use and enjoyment of property is subject to reasonable regulation.[6] This, however, is not the issue. Moreover, here there is no dispute as to Brewer's right to devote his property to the particular uses he elected at the times he elected to do so (App. D at 21). Nor, contrary to the implication of the Court of Appeals, is there any contention that Brewer's use and improvement of his property, when compared to that of property owners who have been afforded 16 U.S.C. §460w-3's benefits, was or will be in any way "detriment[al] to others" (App. A at 8).

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[6] Highly analogous to 16 U.S.C. §460w-3's retrospective classification are zoning ordinances which attempt to operate retroactively to prohibit a prior nonconforming use. The law there, as stated in 8A *McQuillin Mun. Corp.* (3rd Ed. 1976), §25.181, is:

> If when a zoning ordinance was adopted, premises were used for a nonconforming use, one is within his rights in continuing that use. Accordingly, zoning regulations cannot be made retroactive and neither can prior use be removed nor existing conditions be affected thereby. A zoning ordinance may not operate retroactively to deprive a property owner of his previously vested rights; that is to say, a zoning ordinance cannot deprive the owner of the use to which the property was put before the enactment of the ordinance. (At 9)

If Brewer's constitutionally protected right to use and enjoy his property means anything, then Brewer must be free to select among all alternative uses to which his property might be lawfully put, including the liberty to choose not to use his property in a particular fashion, or to put his property to one lawful use at one point in time, and to another legitimate use and enjoyment at some other point in time, without fear that he may be subsequently penalized by the deprivation of benefits for no reason other than the timing or manner of his doing so.[7] Otherwise, constitutional protection of these rights turns on the nature and timing of the use and enjoyment selected, and certain lawful exercises of these personal rights, depending on the character and timing of the use and enjoyment selected, are rendered constitutionally inferior to others. We deal here with a matter that is close to the core of our constitutional system, the liberty to choose among lawful alternatives. A decision to improve property at a particular point in time, standing alone, cannot be entitled to greater constitutional protection than the wholly lawful election to use and enjoy property in its unimproved natural state for a period of time, and at a later date, to improve that property.

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[7] Just as the right to speak includes the right to refrain from speaking, *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977); and the freedom to exercise religion means that the state can no more command piety than it can forbid it, *Torcaso* v. *Watkins*, 367 U.S. 488, 495 (1961); and the right of a woman to choose to carry her fetus to term includes the equal right to abort it, *Maher* v. *Roe*, 432 U.S. 464, 472 n.7 (1977); and the freedom to travel includes the freedom to enter and abide in any state in the Union at one point in time and to change residence to another at a later date, *Dunn* v. *Blumstein*, *supra*, at 338; so too, the right to use and enjoy property must include the right *not* to improve property as an alternative form of lawful use and enjoyment, as well as the freedom to choose when lawfully to put, and use and enjoy property in an improved state.

Brewer's decision not to improve his property until after January 1, 1967; but rather, to use, enjoy and maintain the attributes of his island property in their unimproved condition until July, 1968, and to commence construction of a detached, noncommercial residential dwelling at that time, was the exercise of his fundamental, personal rights in property and to liberty,[8] and is entitled

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[8] Brewer's election to use and enjoy the attributes of his island property in their natural state until July, 1968, also, constituted the exercise of his constitutionally protected right of privacy. That is, to use his property as a private sanctuary and enjoy the blessings of quiet seclusion until July, 1968, rather than improve the property prior to that time. The well-being, sanctity, tranquility and privacy afforded by his island property, the one retreat Brewer selected to escape from the tribulations of his daily pursuits, is certainly of the highest order of a free and civilized society. *Cf., Payton* v. *New York, supra; Rowan* v. *United States Post Office Dept.*, 397 U.S. 728 (1970); *Gregory* v. *Chicago*, 394 U.S. 111, 125 (1969) (Black, J., concurring). As stated in *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969):

> For also fundamental is the right to be free, except in very limited circumstances, from unwarranted governmental intrusions into one's privacy.
>
> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of a man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man." (Citations omitted.)

So viewed, Brewer's right to use and enjoy his property for such lawful purposes as he saw fit, without unwarranted after-the-fact governmental intrusions, granting or denying benefits based on the manner in which he exercised his right of privacy, takes on added constitutional significance.

to constitutional protection from retrospective classification designed to penalize his prior exercise of these constitutional rights.

As to the "fundamental" nature of the rights exercised, however, the District Court and the Court of Appeals concluded otherwise. As noted above, in so doing each ignored the constitutional question presented. The appropriate question is *not* whether 16 U.S.C. §460w-3 "falls in the area of economics and social welfare" legislation (App. C at 19); or whether "the right to use and enjoy property is clearly subject to the government's right of eminent domain" (App. A at 9). But rather, whether the government, incident to its enactment of economics and social welfare legislation authorizing the taking of property by the power of eminent domain, can classify property owners by means of a classifier which penalizes on the basis of the prior exercise of rights explicitly or implicitly protected by the constitution. *San Antonio School District* v. *Rodriquez*, 411 U.S. 1, 17, 33 (1973).

> The court today does *not* "pick out particular human activities, characterize them as 'fundamental;' and give them added protection. . . ." To the contrary, the Court simply recognizes as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands. *Id.* at 31, quoting *Shapiro* v. *Thompson*, *supra*, at 642 (Stewart, J., concurring). (Emphasis in original.)

Thus, the key to discovering whether Brewer's use and enjoyment of his property was the exercise of a "fundamental" constitutionally protected personal right in property and to personal liberty is *not* to be found by engaging in any ad hoc weighing of the relative importance of constitutional rights (App. B at 14-15; App. C at 18-19), or, by simply stating the obvious—that property rights are not absolute and that private property is subject to the power of eminent domain—without analyzing the nature, operation

and purpose of the classifier at issue, and its intended effect on the prior exercise of constitutional rights. Rather, the answer lies in accessing whether the prior exercise of the rights, which the classifier uses as the selecting mechanism for placing property owners in one class or another for purposes of allocating benefits and burdens, is explicitly or implicitly protected by the Constitution. If Brewer's prior exercise of his personal rights in property and to personal liberty is constitutionally protected, it is, by definition, a "fundamental" right. *San Antonio School District* v. *Rodriquez, supra.*

Brewer's decision to use and enjoy his property in a specific lawful fashion at a particular point in time was the exercise of rights, the protection of which have been long recognized as constitutionally mandated, and consequently "fundamental" in nature.

2. The retroactive classification created by 16 U.S.C. §460w-3 serves to penalize Brewer's prior exercise of his constitutionally protected rights.

Brewer fully satisfies the first element of the "improved property" classifier—"detached, noncommercial residential dwelling". Brewer is fenced-out unqualifiedly from the class of property owners entitled to the benefits granted under 16 U.S.C. §460w-3 *only* because of its naked January 1, 1967 cut-off date (App. A at 7).[9] This cut-off date,

[9] As applied to Brewer, 16 U.S.C. §460w-3 creates two classes, indistinguishable except *only* with respect to when construction began. In so doing, it cavalierly establishes a conclusive presumption—construction begun before January 1, 1967 is good, and construction begun on or after January 1, 1967 is bad—which, of course, is neither universally nor necessarily true, but, nonetheless, is incapable of being overcome by proof of the most positive character. Irrebutable presumptions have long been held constitutionally suspect. *E.g., Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632, 644-48 (1974).

which became law on September 26, 1970, classifies on the basis of the prior exercise of constitutionally protected rights, granting or depriving property owners of the benefit of the election to retain a right of use and occupancy solely on the basis of how and when constitutionally protected rights were exercised prior to January 1, 1967.

Clearly, at all times during which Brewer exercised his constitutional right to use and enjoy his property in its natural and unimproved state, September 5, 1966 to July, 1968, and at all times from July 1968 to September 26, 1970, and to the date of taking, during which time Brewer exercised his constitutional rights to use and enjoy his property in an improved condition, the use and enjoyment was proper, legitimate and lawful (App. D at 21).

Nonetheless, on September 26, 1970, Brewer's prior lawful exercise of his constitutional rights was subjected to an after-the-fact classification, relegating him to a less favorable class, and causing him to suffer an undue penalty based on the sole difference of how and when he elected to exercise his constitutional rights, while the prior use and enjoyment to which other property was put is elevated to a more favorable class and rewarded. Without more, the Government cannot discriminate against Brewer and penalize his prior exercise of his constitutional rights, while at the same time rewarding other property owners, simply because Brewer exercised his freedom of choice in a particular fashion, or because his exercise is of more recent—July, 1968—vintage. *Dunn* v. *Blumstein, supra,* at 338-41; *Shapiro* v. *Thompson, supra,* at 634. Brewer's constitutional rights are of little value, indeed illusory, if the Government, incident to the taking of his property, can penalize his prior exercise of those rights, and, thus, in-

directly deny them retrospectively. *Harman* v. *Forssenius*, 380 U.S. 528, 540 (1965).[10]

The basis for the classification established by 16 U.S.C. §460w-3—when and how Brewer, during the period of time from September 5, 1966 to July, 1968, exercised his constitutional rights—operates retrospectively to penalize his prior exercise of his constitutional rights.

3. The Government has not carried its heavy burden and demonstrated that the basis for the 16 U.S.C. §460w-3 classification is necessary to promote or protect a compelling and substantial governmental interest.

Because 16 U.S.C. §460w-3 classifies on the sole basis of Brewer's prior lawful exercise of his constitutionally protected rights, and serves to penalize the prior exercise of those rights, it may withstand constitutional scrutiny only upon a clear showing by the Government that it is necessary to promote or protect a compelling and substantial

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[10] The constitutional infirmity which attaches to the statutory basis for this kind of retroactive classification is perhaps more readily recognized when applied to other fundamental rights. Can there be any doubt that classification incident to the enactment of economics and social welfare legislation authorizing the exercise of eminent domain, granting or denying the right to retain use and occupancy, based simply on the prior lawful exercise of the right to speak and associate, respecting the Apostle Islands National Lakeshore, where the content or manner may be at odds with the views held by the Secretary of the Interior, could not pass constitutional muster? *See, e.g., Speiser* v *Randall*, 357 U.S. 513, 518-19 (1958); *Kent* v. *Dulles*, 357 U.S. 116, 129-30 (1958).

governmental interest. *Dunn* v. *Blumstein, supra,* at 339-42.[11]

It is not sufficient for the Government to show that the subject classification furthers a substantial governmental interest. In pursuing the objectives of the Apostle Islands National Lakeshore, the Government cannot choose means that unnecessarily penalize constitutionally protected activity. *Cleveland Board of Education* v. *LaFleur, supra,* at 648. As stated in *Dunn* v. *Blumstein, supra,* at 343:

> Statutes affecting constitutional rights must be drawn with "precision," [citations omitted], and must be "tailored" to serve their legitimate objectives. [Citation omitted.] And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose "less drastic means". (Citation omitted.)

Congress has revealed its express legislative objectives:

> In order to conserve and develop for the benefit, inspiration, education, recreational use, and enjoyment of the public certain significant islands and shoreline of the United States and their related geographic, scenic, and scientific values, there is hereby established the Apostle Islands National Lakeshore .... 16 U.S.C. §460w.

Neither the District Court, the Court of Appeals nor the Government, however, asserts that this express legislative objective is promoted or protected by the classifica-

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[11] Although the classification is to be measured by the strict scrutiny equal protection test, as hereinafter discussed, the artificial January 1, 1967 cut-off date cannot pass constitutional challenge even under the more lenient equal protection standard, for the reason that it is wholly arbitrary and unrelated to any legitimate governmental interest.

tion set up under 16 U.S.C. §460w-3.[12] Rather, they ascribe to Congress three different unarticulated goals: (1) a desire to soften the impact of condemnation as to those property owners who have a sense of attachment for their property; (2) the prevention of speculation or profiteering, *i.e.*, discouraging property owners from commencing the construction of improvements after December 31, 1966 and during the mere pendency of the legislation before Congress, which activity might increase the costs of acquisition by the Government; and (3) administrative convenience, *i.e.*, planning and preparation prior to enactment of the legislation.

a. The January 1, 1967 cut-off date cannot identify property owners who feel a sense of attachment to their property.[13]

It should be perfectly clear that the January 1, 1967 cut-off date cannot serve the purpose of identifying owners

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[12] Indeed, as recognized by the Government, the express purposes of the Apostle Islands National Lakeshore are not furthered by 16 U.S.C. §460w-3, since the objectives would be obtained more quickly and efficiently if no property owners were permitted to retain the use and occupancy of their property after condemnation.

[13] As a threshold matter, a purpose to soften the impact of condemnation, for only those property owners who feel a wholly subjective and undefined degree of attachment for their property, is not a legitimate governmental purpose or interest. Granted, the classification serves to benefit certain favored property owners. But, what is the legitimate governmental or public purpose furthered by the classification? To justify the Government interposing its authority on behalf of the public, it must appear that the interests of the public generally, as distinguished from those of a particular private class, require such interference. *See, San Diego Gas & Electric Co.* v. *City of San Diego*, ____ U.S. ____, 67 L.Ed. 2d 551, 563 (1981) (Brennan, J., dissenting). Otherwise stated, since Brewer's right to lawfully use and enjoy his property as he chooses so long

(footnote continued)

of property "on the date of its acquisition"[14] who have a sense of attachment to their property. Entitlement to the 16 U.S.C. §460w-3 election is *not* predicated on the acquisition date owner's ownership, use or enjoyment of the property prior to January 1, 1967. Ownership "on the date of its [the property's] acquisition" by the Government need *not* be the same as that prior to January 1, 1967, or, for that matter anytime thereafter to the "date of its acquisition". The classifier does *not* limit the grant of the 16 U.S.C. §460w-3 election to the "improver" of the property. Nor does 16 U.S.C. §460w-3 impose any requirement of actual use and einjoyment, let alone use and enjoyment by the owner, prior to the "date of its acquisition". To qualify for the 16 U.S.C. §460w-3 election, the owner "on the date of its acquisition" need not even have ever seen or been on the property. The acquisition date owner's attachment, if it exists at all, may be of very short duration; that is, post January 1, 1967 and September 26, 1970. Indeed, the "successors or assigns" language indicates that, after the "date of its acquisition", a retained right of use and occupancy may be transferred to a stranger to the property; that is, one who was not the owner, user or enjoyer of the property, either on the "date of its acquisition",

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(footnote continued)

as he harms nobody is an inherent and constitutional right, classification cannot be invoked to penalize his particular use and enjoyment of his property unless such use and enjoyment, when compared with the particular uses and enjoyment falling outside the classification, unreasonably endangers or threatens the public health, safety, morals or welfare. What is it about Brewer's use and enjoyment of his property that distinguishes it from the use and enjoyment of owners who improved their property prior to January 1, 1967 so far as the public is concerned? What evil or interest within the sphere of governmental concerns is sought to be protected against or advanced by the classification?

[14]The "date of its acquisition" is apt to be, and in Brewer's case was, a date many years after January 1, 1967, and September 26, 1970; over 14 and 10 years, respectively.

or at any time prior thereto.[15] Thus, the acquisition date owner may have acquired the property after January 1, 1967 or September 26, 1970 for reasons of speculation, intending to sell his right of use and occupancy to another at a profit after the acquisition date.

It strains logic and offends common sense to conclude that, simply because property is improved or unimproved as of a given date, the owner of that "property on the date of its acquisition", which, of course, may or may not be the same owner as the owner on December 31, 1966, will have a greater or lesser degree of attachment to it. January 1, 1967, standing alone, simply cannot identify attachment; it stands naked as a classifier.

Attachment to property being subjective in nature, predictions about attachment involve judgments appropriately made on an individualized basis, not by means of a crude, objective cut-off date. More significantly, given the attributes of the island property involved, whether property is improved or unimproved, let alone whether the improvement was commenced prior to January 1, 1967, is

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[15] Moreover, and perhaps of greater importance, as long as the property meets the criteria of "improved property", no other or further criterion, designed to assure the property's existing or continued compatibility with the goals of the Apostle Islands National Lakeshore, need be met. Or, even that the condition of the property, as of December 31, 1966, was consistent with the purposes of the Apostle Islands National Lakeshore. *See,* 16 U.S.C. §460w. The retention of a right of use and occupancy is conditioned *only* on continued use "for noncommercial residential or for agricultural purposes." 16 U.S.C. §460w-3(b). The retention of a right of use and occupancy is *not* conditioned, for instance, on any standards as to size, shape, color, condition of repair, method or materials of construction or location of the dwelling or any accessory structures, the demographic make-up of persons residing on or using the property, levels of air, noise and water pollution, trash and refuse, traffic patterns to, from or over the property and the waters within the boundaries of the Lakeshore, etc., etc.

not an accurate indicator of attachment. Rather, it is the actual use and enjoyment of property that identifies attachment, not the property's character as of any given arbitrary date. For instance, the owner on the date of acquisition could have acquired the property by inheritance, be addicted to city life and abhor the out-of-doors, and consequently have absolutely no attachment to or feeling for it. Or, conversely, the owner could be someone like Brewer, who, prior to January 1, 1967, actually used and enjoyed his property, and spent long hours of labor (but after January 1, 1967) constructing with his own hands and back a very special place to which he is very much attached.

The cut-off date classifies in an arbitrary manner and in a way that is unrelated to the asserted purpose—identification of owners who feel a sense of attachment to their property. As such, it cannot serve to justify the classification, and the consequent discrimination Brewer suffers, based solely on his prior exercise of constitutionally protected activity—his decision whether or not to commence construction before January 1, 1967.

b. A purpose to discourage the improvement of property, and thereby hold down the cost to the Government of acquiring property, is constitutionally impermissible.

The second purpose advanced to justify classification by means of the January 1, 1967 cut-off date—discouraging owners from lawfully constructing improvements—is patently unconstitutional. The underlying rationale runs as follows—property owners can be deterred from improving their property by denying them the right to elect to retain the use and occupancy of their property in the event they choose to do so, and, therefore, the classification can be

justified as a protective device to hold down speculation and profiteering, and, thus, the cost of acquisition.[16]

A classification mechanism which is designed and serves the purpose of discouraging the lawful use and enjoyment of property in a certain fashion at a particular time (the construction of a detached, noncommercial residential dwelling on or after January 1, 1967, but before September 26, 1970) cannot serve as justification for the retroactive classification established by the January 1, 1967 cut-off date, since the purpose is constitutionally impermissible. As stated in *Shapiro* v. *Thompson, supra,* at 631:

> If a law has "no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional."

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[16] The reasoning can be read to say that the cut-off date seeks to discourage only those property owners who are motivated to improve their property solely in order to qualify for retained use and occupancy. The classification, however, is not tailored to serve that objective; but rather, is all encompassing, and fences out all post-December 31, 1966 improvers of property, irrespective of their motivation. In so doing it presumes that all are motivated solely by a desire to retain the right of use and occupancy. Nothing in the legislative history or the record supplies any basis in fact for such a presumption. Given the remote nature of island property and the hardships of improving it, coupled with the measure of just compensation that could realistically be expected, to assume that property owners might be so motivated; that is, that they would incur the substantial time and expense necessary to improve their island property only so that, if and when the proposed legislation became law, they would be entitled to elect to retain the right of use and occupancy, escapes logic and constitutes pure speculation without any basis in fact. Clearly there is no evidence that this was the motivation for Brewer's decision to commence the improvement of his property during July, 1968. More fundamentally, constitutional rights do not rest or turn on the motivation for their exercise.

See also, Memorial Hospital v. *Maricopa County*, 415 U.S. 250, 263-64 (1974). Constitutional rights may not be penalized simply because of hostility to their exercise. *Watson* v. *Memphis*, 373 U.S. 526, 535 (1963). Problems of the fisc are legitimate concerns.[17] But the Government cannot accomplish such a purpose by significantly penalizing Brewer's wholly lawful prior exercise of his constitutional rights. *San Diego Gas & Electric Company* v. *City of San Diego, supra*, 67 L.Ed. 2d at 578-79 (Brennan, J., dissenting). The saving of money cannot serve to justify the classification. *Shapiro* v. *Thompson, supra*, at 633; *Memorial Hospital* v. *Maricopa County, supra*, at 263.

c. The third justification—administrative convenience—is imaginary.

First, it is highly important to make clear the substance of the third purpose ventured as justification for the challenged classification. When stripped of its camouflage, it employs the same unconstitutional means as the second—discouragement—to achieve administrative convenience prior to passage of the enabling legislation. Implicit in the third asserted purpose is the concept of deterence. Otherwise, the premise for the asserted preparation and planning purpose prior to September 26, 1970 is without foundational support. For the reasons above stated, the desired end cannot justify the unconstitutional means employed. Even the most legitimate goal may not be advanced in a constitutionally impermissible manner. *Carey*

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[17] The ventured cost savings produced by the cut-off date is illusory. This is because the more property which is included within the "improved property" classifier, the fewer out-of-pocket dollars will be needed to fund acquisition. *See*, 16 U.S.C. §460w-3(a)—"The Secretary shall pay to the owner the fair market value of the property on the date of such acquisition *less the fair market value on such date of the right retained by the owner.*" (Emphasis added.)

v. *Brown*, 447 U.S. 455, 464-65 (1980); *Dunn* v. *Blumstein*, *supra*, at 346-47.[18] Administrative convenience prior to the enactment of the proposed legislation cannot serve to justify an attempt to chill Brewer's decision to exercise his constitutional rights during July, 1968 by the imposition of a penalty on September 26, 1970 in the event he elected to do so. *Dunn* v. *Blumstein*, *supra*, at 350-51.

Second, and more fundamentally, central to the reasoning underlying the administrative convenience—planning and preparation—justification are: (1) the compilation of factual information as to the status and character of improved and unimproved property within the boundaries of the Apostle Islands National Lakeshore; and (2) the actual use of such factual information prior to September 26, 1970. Absent either, the ventured planning and preparation purposes are imaginary. *See, e.g., Shapiro* v. *Thompson*, *supra*, at 634-35. The legislative history and the record are utterly devoid of evidence that either the Secretary or the Congress collected or considered data or information respecting improved and unimproved property within the boundaries of the Apostle Islands National Lakeshore for planning or any other purpose prior to September 26, 1970. This is especially true as to Brewer's property. The Government's naked assertion that classification by means of the retroactive cut-off date permits the Secretary to prepare, and the Congress to consider, plans for the Apostle Islands National Lakeshore cannot stand. It lacks factual foundation. As such, the use of January 1,

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[18] Over 50 years ago, Justice Holmes, in speaking of "property rights protected by the Constitution," warned that courts were:

> . . . in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way. *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 416 (1922).

1967 as a classifying criterion cannot have a fair and substantial relation to any non-existent planning or preparation objective; but is wholly unrelated thereto.

Classification on the basis of the January 1, 1967 cut-off date is wholly unrelated to the ventured objectives. There is absolutely no ground of difference between the classes established by 16 U.S.C. §460w-3, or the basis for doing so, that can offer a rational explanation for the January 1, 1967 cut-off date as a basis for denying its benefits to Brewer.

CONCLUSION

For the foregoing reasons, Brewer respectfully prays that a writ of certiorari should issue to settle the important question of constitutional law presented, and to bring the Judgment and Opinion of the Court of Appeals (and District Court) below into conformity with the applicable principles of constitutional law mandated by the prior decisions of this Court governing classification predicated on the prior exercise of constitutionally protected activity.

Respectfully submitted,

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April, 1982

Appendix

APPENDIX A

Opinion and Judgment of the Court of Appeals for the Seventh Circuit, decided February 16, 1982

In the

United States Court of Appeals

For the Seventh Circuit

No. 81-1190

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

16.92 ACRES OF LAND, etc.,

Defendant,

APPEAL OF: WILLIAM C. BREWER.

No. 81-1484

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

65.60 ACRES OF LAND, LOCATED IN THE TOWN OF RUSSELL, COUNTY OF BAYFIELD, et al.,

Defendants-Appellants.

Appeals from the United States District Court for the Western District of Wisconsin.
Nos. 76-C-169 & 76-C-199—*James E. Doyle,* Judge.

Argued January 26, 1982 — Decided February 16, 1982

Before CUMMINGS, Chief Judge, PELL and SPRECHER, *Circuit Judges.*

PER CURIAM. This is a consolidated appeal from judgments entered in favor of the United States in actions to condemn certain real property owned by the appellants. We

have been asked to address two issues: (1) whether the United States has the authority to acquire land by condemnation in order to create the Apostle Islands National Lakeshore; and (2) whether the "improved property" classification established by 16 U.S.C. §460w-3 violates the equal protection of law guarantee encompassed in the Fifth Amendment. For the reasons discussed in this opinion, we affirm the judgments of the district court.

I.

On September 27, 1970, Congress established the Apostle Islands National Lakeshore. *See* Pub. L. 91-424, 84 Stat. 880, 16 U.S.C. § 460w (1970). The Lakeshore was to be comprised of both mainland property and several islands, all located on or near the Wisconsin shoreline of Lake Superior. The Secretary of Interior was given the authority to acquire land located within the boundaries of the Lakeshore area. Since 1970, Congress has authorized $5,250,000 to be appropriated for the acquisition of land within the Lakeshore area. *See* 16 U.S.C. §460w-7 (1974).

The appellants in these consolidated appeals are owners of real property located within the Lakeshore area. The United States brought successful actions in district court to condemn their respective property interests. On appeal, the appellants contest the Secretary of Interior's authority to condemn their property.

Appellant William Brewer raises an additional issue before this Court. Congress granted a limited right of use and occupancy to landowners who had "improved" their property prior to January 1, 1967. In July of 1968, Brewer commenced construction of a detached, non-commercial residential building on his previously unimproved tract of land. Brewer's "improvement" did not meet the January 1, 1967 cutoff date set by Congress for "improve-

ments." Thus, in addition to the issue regarding the Secretary's authority to condemn land, Brewer asserts that the cutoff date violates his right to equal protection under the law. He argues that he should be entitled to the same rights of use and occupancy afforded to those landowners whose property had been improved prior to January 1, 1967.

II.

The Act establishing the Apostle Islands National Lakeshore neither authorizes nor forbids the acquisition of land by condemnation. The Lakeshore acquisition statute provides in pertinent part:

> The Secretary may acquire within the boundaries of the lakeshore lands and interests therein by donation, purchase with donated or appropriated funds, or exchange, but lands and interests in lands owned by the State of Wisconsin may be acquired only by donation.
> • • •

16 U.S.C. § 460w-2.

The Government, however, relies upon the General Condemnation Act of August 1, 1888, as amended, 40 U.S.C. § 257, to provide it with the necessary statutory authority to condemn the appellants' properties. The material portion of 40 U.S.C. § 257 reads as follows:

> In every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so • • •

The crux of the appellants' argument is that had Congress desired the Secretary to have the power of condemnation in order to acquire property for the National

Lakeshore, it would have specifically provided for it in 16 U.S.C. § 460w-3. Considering the nature of eminent domain, as well as the plain language of 40 U.S.C. § 257, we can only conclude that the appellants' argument must fail.

There is little doubt that the power of eminent domain is an attribute of sovereignty. The taking of private property for public use upon just compensation is so often necessary for the proper performance of governmental functions that the power is deemed to be essential to the life of the government. *Georgia* v. *City of Chattanooga*, 264 U.S. 472, 480 (1924). Every person who acquires or occupies land does so at the risk of being evicted by the exercise of the superior right of the government or its delegate to acquire his interest upon payment of just compensation. *Green Street Association* v. *Daley*, 373 F.2d 1, 6 (7th Cir.), *cert. denied*, 387 U.S. 932 (1967). This power of condemnation is coextensive with the government's power to purchase. *United States ex rel. Tennessee Valley Authority* v. *Welch*, 327 U.S. 546, 554 (1946).

It has been uniformly held that authority to acquire real property conferred by the enactment of a statute after the Act of August 1, 1888, 40 U.S.C. § 257, carries with it the power to condemn.[1] Thus, unless it desires to exclude condemnation, there is no need for Congress to specifically include "condemnation" as a permissible method of prop-

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[1] *See Albert Hansen Lumber Co.* v. *United States*, 261 U.S. 581, 587 (1923); *United States* v. *265.0 Acres of Land, Etc., Augusta Co., Va.*, 428 F.2d 459, 460 (4th Cir. 1970); *Swan Lake Hunting Club v. United States*, 381 F.2d 238, 241 (5th Cir. 1967); *United States* v. *Kennedy*, 278 F.2d 121, 127 (9th Cir. 1960); *United States* v. *Advertising Checking Bureau, Inc.*, F.2d 770, 772 (7th Cir. 1953); *Barnidge* v. *United States*, 101 F.2d 295, 297-98 (8th Cir. 1939); *United States* v. *0.37 Acres of Land in Cty. of Flathead, Etc.*, 414 F. Supp. 470, 472 (D. Mont. 1976).

erty acquisition in a statute.[2] Our Court recognized this principle several years ago in *United States* v. *Advertising Checking Bureau, Inc.*, 204 F.2d 770 (7th Cir. 1953). There, the authority of the Government to condemn property in order to house a federal agency was affirmed on the basis of 40 U.S.C. § 257. Commenting on the lack of necessity for specific authorization to condemn property in a procurement statute, this Court stated:

> As authority [has] already been conferred to procure real estate for public uses by condemnation, it would seem to [be] quite unnecessary to embody in this Act specific authority to acquire real estate by condemnation proceedings. We must assume that Congress had full knowledge of the Act of August 1, 1888 and of the interpretation that [has] been placed upon it by the courts.

United States v. *Advertising Checking Bureau, Inc., supra*, 204 F.2d at 772, quoting *Barnidge* v. *United States*, 101 F. 2d 295, 297-98 (8th Cir. 1939).

While donation, purchase, or exchange may be preferred methods of acquisition, they are not the only methods which the government may employ to acquire the appellants' properties. There is nothing in either 16 U.S.C. § 460w-2[3]

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[2] An example where Congress specifically ruled out condemnation as a method of property acquisition is found in the Hells Canyon National Recreation Area Act, 16 U.S.C. § 460gg (1975). In this Act, the Secretary was authorized to purchase land "with donated or appropriated funds *with the consent of the owner*, [by] donation, or exchange." 16 U.S.C. § 460gg-6(a) (emphasis added). *See also* 16 U.S.C. § 401z (1980) (Boston National Historical Park Act).

[3] The appellants argue that the plain language of 16 U.S.C. § 460w-2, with its omission of the word "condemnation," suggests that the government may acquire land only by exchange, donation, or voluntary purchase. However, we note that in 16 U.S.C. § 460w-2, Congress specifically ruled out condemnation of property owned by the State of Wisconsin, thereby creating an implication that no such provision was intended for private property.

or its legislative history[4] to suggest that the government does not have the power of condemnation. Without limiting language from Congress, we must conclude that the Secretary of Interior has implicit authority to condemn the appellants' properties.

III.

As a condition of government acquisition of property, Congress granted to certain private landowners in the Lakeshore area the right to retain a limited interest in their property. 16 U.S.C. § 460w-3 provides in pertinent part:

> (a) With the exception of not more than eighty acres of land to be designated within the lakeshore boundaries by the Secretary as an administrative site, visitor center, and related facilities, as soon as practicable, any owner or owners of improved property on the date of its acquisition by the Secretary may, as a condition of such acquisition, retain for themselves and their successors or assigns a right of use and occupancy of the improved property for noncommercial residential purposes for a definite term not to exceed twenty-five years, or, in lieu thereof, for a term ending at the death of the owner, or the death of his spouse, whichever is the later. The owner shall elect the term to be reserved. The Secretary shall pay to the owner the fair market value of the property on the

[4] Despite appellants' argument to the contrary, we, like the district court, find the legislative history and the colloquies that took place before the Senate Subcommittee to be of little assistance in resolving this issue. If anything, these records indicate that the power of condemnation was viewed by the Senate as a necessary method of land acquisition. *See Apostle Islands National Lakeshore: Hearings on S. 778 Before the Subcomm. on Parks and Recreation of the Senate Comm. on Interior and Insular Affairs*, 90th Cong., 1st Sess. 41 (1967).

date of such acquisition less the fair market value on such date of the right retained by the owner.

• • •

(c) The term "improved property," as used in this section, shall mean a detached, noncommercial residential dwelling, the construction of which was begun before January 1, 1967 (hereinafter referred to as "dwelling"), together with so much of the land on which the dwelling is situated, the said land being in the same ownership as the dwelling, as the Secretary shall designate to be reasonably necessary for the enjoyment of the dwelling for the sole purpose of noncommercial residential use, together with any structures accessory to the dwelling which are situated on the land so designated.

Appellant William Brewer acquired 16.92 acres of unimproved Lakeshore property on September 5, 1966. In July of 1968, Brewer commenced construction of a detached, noncommercial residential dwelling on his property. Had construction of this dwelling begun prior to January 1, 1967, it is undisputed that Brewer would have come within the coverage of 16 U.S.C. § 460w-3. However, because Brewer did not meet the January 1, 1967 deadline, he was denied the opportunity to retain a limited interest in his property.[5] Brewer claims that the "unimproved prop-

[5] Prior to trial, the Government wrote two letters to Brewer offering him the opportunity to retain a life interest in his property. Brewer turned down these offers. The Government argues that Brewer no longer has standing to challenge 16 U.S.C § 460w-3 because he was offered exactly the same limited interest in his property as was offered landowners whose property fell within the definition of "improved property." However, the Government stated at oral argument that negotiations are no longer going on between Brewer and the United States. In light of this fact and after considering the express terms of 16 U.S.C. § 460w-3, we conclude, for purposes of this appeal, that Brewer has the necessary standing to challenge 16 U.S.C. § 460w-3.

erty" classification established by 16 U.S.C. § 460w-3 violates the equal protection of law guarantee encompassed in the Fifth Amendment.[6]

A.

The first step in our analysis is to determine the standard by which we will evaluate 16 U.S.C. §460w-3. This requires an examination of the nature of Brewer's property interests.

Brewer argues that the freedom to use and enjoy one's property is a fundamental right and that any restrictions upon this right should be subject to the strictest of scrutiny. Such a standard would require the Government to clearly show that use of the January 1, 1967 deadline is necessary to promote or protect a compelling and substantial government interest. However, it is undisputed that the right to enjoy one's property is subject to the legitimate exercise of eminent domain by the government. We thus agree with the district court that strict scrutiny is not the proper standard to use to evaluate the constitutionality of the cutoff date.

It is axiomatic that property rights are not absolute; for a government cannot exist if a citizen may at will use his property to the detriment of others. *Nebbia* v. *New York*, 291 U.S. 502, 523 (1934). *See Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74, 84-85 (1980). As we have previously noted, every person who acquires land does so at the risk of being evicted by the exercise of the superior right of the government to acquire his interest upon payment of just compensation. *Green Street Association* v. *Daley, supra*, 373 F.2d at 6. It is equally

[6] The Due Process Clause of the Fifth Amendment forbids the Federal Government to deny equal protection of the laws. *Bolling* v. *Sharpe*, 347 U.S. 497, 500 (1954).

clear that the government, once given the proper authority, may condemn total or partial interests in property. *See United States* v. *General Motors Corp.*, 323 U.S. 373, 380 (1945). The right to use and enjoy property is clearly subject to the government's right of eminent domain. With these factors in mind, we conclude that property interests are protected by the equal protection guarantee to the extent that legislative classifications cannot adversely affect the property interests of a class unless the classification is rationally related to a legitimate legislative goal. *Ohio Inns, Inc.* v. *Nye*, 542 F.2d 673, 680 (6th Cir. 1976), *cert. denied*, 430 U.S. 946 (1977). *See Village of Belle Terre* v. *Borass*, 416 U.S. 1, 7-8 (1974).

This rational-basis standard has been described as a relatively relaxed standard reflecting an awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S. 307, 314 (1976). The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific. *Metropolis Theatre Co.* v. *City of Chicago*, 228 U.S. 61, 69-70 (1913). These accommodations by the legislature will not be set aside if *any* state of facts reasonably may be conceived to justify them. *McGowen* v. *Maryland*, 336 U.S. 420, 426 (1961).

B.

The procedure that allows certain land owners to retain a limited interest in their condemned property was described in Lakeshore legislative history as "customary in . . . recreation-oriented authorizations." H.R. Rep. No. 91-1280, 91st Cong., 2d Sess. 6, *reprinted in* [1970] U.S.

Code Cong. & Ad. News 3909, 3913. This procedure is known, and was referred to in the Senate hearings on the Lakeshore bill, as the "Cape Cod formula." *See Apostle Islands National Lakeshore: Hearings on S. 778 Before the Subcomm. on Parks and Recreation of the Senate Comm. on Interior and Insular Affairs,* 90th Cong., 1st Sess. 37 (1967) (Comment by Senator Bible) [hereinafter cited as *1967 Hearings*].[7]

While the legislative history of the Lakeshore Act is for the most part silent as to the rationale behind the use of the "Cape Cod formula," the legislative history of the Cape Cod Act itself is of some guidance.[8] It reveals that the "Cape Cod formula" attempts to lessen the burden of condemnation for private landowners who have developed their property, while at the same time attempting to guarantee maximum access of undeveloped lands to the public. *See* S. Rep. No. 428, 87th Cong., 1st Sess. 27, *reprinted in* [1961] U.S. Code Cong. & Ad. News 2212, 2235. Use of the cutoff date enables the government to ascertain from a certain date exactly which property will be subject to immediate and total condemnation. *Id.* at 26-27, [1961] U.S. Code Cong. & Ad. News at 2235. A cutoff date also

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[7] It was the Cape Cod National Seashore Act which for the first time allowed owners of "improved" property to retain a limited interest in their condemned property. *See* Pub. L. 87-126, 75 Stat. 284, 16 U.S.C. § 459b (1961).

[8] We are not limited in our analysis to the legislative history of the Lakeshore Act. Because Congress relied on a procedure established in a previous act, we may infer that the rationale behind the prior scheme is applicable to the Lakeshore Act as well. *See Trafelet v. Thompson,* 594 F.2d 623, 626-27 (7th Cir.), *cert. denied,* 444 U.S. 906 (1979).

prevents anticipatory construction of residential buildings by owners of undeveloped property. *Cf. id.* at 25, [1961] U.S. Code Cong. & Ad. News at 2233 (the Cape Cod Act provides that a cutoff date shall also apply to the date of the acquisition of property to prevent fraudulent conveyances to children). Finally, a cutoff date discourages construction of buildings for the purpose of adding value to the property which the government, and not the landowner, ultimately must bear. *1967 Hearings, supra* at 252 (Comment by Senator Moss).

The above factors indicate that a reasonable basis does exist for establishing a retrospective cutoff date to determine whether a limited property interest may be retained by an owner of property. It is not for us, in this case, to question the wisdom of the exact date of the cutoff. Justice Holmes perhaps put the point best when he stated:

> When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked upon by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark. *Louisville Gas & Electric Co.* v. *Coleman*, 277 U.S. 32, 41 (1928) (dissenting opinion).

The January 1, 1967 cutoff date cannot be said to be very wide of any reasonable mark.[9] For this reason, we conclude that it was within the discretion of Congress to establish January 1, 1967 as the cutoff date for "improved" property. As such, 16 U.S.C. § 460w-3 does not violate the equal protection guarantee encompassed in the Fifth Amendment.

IV.

For the reasons discussed in this opinion, the decisions of the district court are hereby AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

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[9] The original Apostle Islands National Lakeshore bill, proposed by Senator Nelson in 1965, had a cutoff date of January 1, 1965. *See* S. 2498, 89th Cong., 1st Sess. (1965). The Lakeshore bill was proposed again in 1967; this time with a January 1, 1967 cutoff date. *See* S. 778, 90th Cong., 1st Sess. (1967). This bill was passed unanimously by the Senate on August 21, 1967. The final bill, which was enacted in 1970, retained the 1967 cutoff date. *See* H.R. 9306, 91st Cong., 2d Sess. (1970); S. 621, 91st Cong, 2d Sess. (1970). Why a 1970 cutoff date was not incorporated into the Act is uncertain. However, because there are rational reasons for the use of a retrospective cutoff date, that January 1, 1970 may have been a less onerous date does not invalidate the 1967 cutoff. Congress chose to retain the 1967 cutoff, and this mark does not appear to be wide of any reaosnable mark.

Per Curiam Opinion

JUDGMENT — ORAL ARGUMENT
UNITED STATES COURT OF APPPEALS
For the Seventh Circuit
Chicago, Illinois 60604
February 16, 1982

Before

Hon. WALTER J. CUMMINGS, *Chief Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. ROBERT A SPENCER, *Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 81-1190 vs.
16.92 ACRES OF LAND, etc.,

Defendant,

APPEAL OF: WILLIAM C. BREWER.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 81-1484 vs.
65.60 ACRES OF LAND, LOCATED IN THE TOWN OF RUSSELL, COUNTY OF BAYFIELD, et al.,

Defendants-Appellants.

Apppeals from the United States District Court for the Western District of Wisconsin.
Nos. 76-C-169 and 17-C-199
Judge James E. Doyle

This cause was heard on the record from the United States District Court for the Western District of Wisconsin, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

APPENDIX B

Transcript of Oral Ruling and Order of the United States District Court for the Western District of Wisconsin on Petitioner's Motion for Summary Judgment, rendered September 11, 1980.

Now, on the matter of the challenge to the provision about classifying those who will be granted what I'll term for shorthand purposes as a leasehold opportunity in their residential property and those who are denied that opportunity by the legislation, I think it is a serious question whether that issue is ripe because I don't—I'm not aware of anything that does prevent the Secretary from making a deal with somebody who constructed the recreational—the residential property after January 1, 1967 and events simply haven't unfolded yet, as Mr. Franke says, and that may be the proposition that is presented to Mr. Brewer ultimately, but that is an uncertain matter and clearly, as defendants argue, on the fact of the statute the power is there to exclude Mr. Brewer from that opportunity and so I will proceed on the basis that that issue is ripe and we'll address it.

I think there really is no persuasive authority that the power to enjoy one's property such as this, and it's a real estate enjoyment of a residential piece of property, I think there just is no persuasive authority that that interest, important as it is and not at all to be disparaged, ranks in the constitutional scheme which individual interests such as those embodied in the First Amendment and therefore I would decline very explicitly to adopt as a test here the test that before that interest can be impaired, there must be a showing of a compelling governmental interest and a showing that the particular measure

is the least restrictive measure and I apply a much milder test for economic legislation generally as to whether the particular impairment of that interest is a measure rationally related to the attainment of a legitimate governmental purpose.

The creation of a lakeshore is clearly a legitimate governmental purpose and the acquisition of property in the creation of the lakeshore, of course, is a means or a measure rationally related to that general purpose, but we're talking in that context about another set of purposes and another set of ends and means.

Counsel for the defendant would have me ascribe to Congress some pretty cold-blooded considerations about saving Government money and would have me ascribe to Congress that consideration as I guess the sole consideration, or at least the dominant consideration in what is done here.

I know there's a real world out there and that people in Congress live in it and that money is a big thing and spending money is a big thing and people are politically vulnerable if they spend too much, et cetera, et cetera, but I do not think it's proper for the courts to assign what one might call the most materialistic kind of a purpose rather than some other purpose, or at least some combination of purposes, and I believe it is quite fair to ascribe to Congress the purpose—several purposes of which I'll just mention a couple, and I won't mention them as articulately as Mr. Franke did a few minutes ago, but it certainly is fair to ascribe to Congress the thought that when it moves in with a project of this kind, with the power of eminent domain which is rough stuff, that it will respect—it will choose to respect in some degree the interests of those people who are there in place and with

these cottages and homes and so forth and that it will do something—at least provide an opportunity for those people to have the blow somewhat softened. That is a proper and legitimate governmental purpose.

It is also a proper and legitimate governmental purpose to prevent speculation and it's not unreasonable to think that under certain circumstances, there might be those who would undertake to exploit the developing set of circumstances in financial terms. Those are legitimate governmental purposes within the context of the whole project and the idea of drawing a line that would be intended to leave on one side of it generally those people with some rather long standing attachments to their buildings and those people who have clearly not engaged in any kind of effort to exploit the thing financially, the effort to put those people in one category and others who either are in truth less attached or who may possibly have engaged in some profiteering on the other is a legitimate effort on the part of Congress.

Using a date for that purpose is a crude device and there is absolutely no question about it when the date is used, then one could examine all those that are in one category and those in the other category find that there is some people who shouldn't be where they are, but it is not irrational and specific dates chosen by Congress is not irrational and for those reasons I would reject the defendant's contention in that respect as well.

I do deny the defendant's Motion for Summary Judgment and I will enter a written order which will simply embody that denial; not all the discussion, the reasons that are a matter of record here.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

76-C-169

UNITED STATES OF AMERICA,

Plaintiff,

v.

16.92 ACRES OF LAND; WILLIAM C. BREWER; TREASURER, TOWN OF LA POINTE; TREASURER, COUNTY OF ASHLAND,

Defendants.

ORDER

(Brewer; Basswood Island)

(Filed September 11, 1980

Defendant William C. Brewer's motion for summary judgment dismissing this action on its merits is denied.

Entered this 11th day of September, 1980.

BY THE COURT:

/s/ James E. Doyle
District Judge

APPENDIX C

Memorandum of the United States District Court for the Western District of Wisconsin on Petitioner"s Motion for Reconsideration, entered October 7, 1980.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

76-C-169

UNITED STATES OF AMERICA,

Plaintiff,

v.

16.92 ACRES OF LAND, LOCATED IN TOWN OF LaPOINTE, COUNTY OF ASHLAND, WISCONSIN, WILLIAM C. BREWER, TREASURER, TOWN OF LaPOINTE, ASHLAND COUNTY, TREASURER, COUNTY OF ASHLAND, WISCONSIN,

Defendants.

MEMORANDUM
(Filed October 7, 1980)

Defendant has moved for reconsideration of the order entered herein denying his motion for summary judgment on the merits. He states that that order was based on an erroneous proposition, namely, that his use and enjoyment of his property is not "the exercise of a fundamental, constitutionally protected, personal right in property." No doubt there was a failure on my part to express myself from the bench with sufficient clarity. There is no question that defendant's use and enjoyment of his property is "constitutionally protected," and I agree that it can fairly be described as a "personal right in property." The question is whether it is "fundamental" as that adjective has been used, as a word of art, to trigger so-called "strict scrutiny": that is, whether the right can be im-

paired or eliminated only in the presence of a compelling governmental interest and whether the particular means of impairment or elimination must be the least restrictive means to vindicate the compelling governmental interest. I think it clear that the exercise of the power of eminent domain to create a park falls in the area of economics and social welfare, rather than in the area of those individual freedoms, among which First Amendment freedoms are paramount, in which the strict scrutiny test is to be applied. I believe that I have applied the proper test of "reasonable basis," or means reasonably related to the furtherance of a legitimate governmental purpose. *See Dandridge* v. *Williams*, 397 U.S. 471, 484-486 (1970).

Defendant moves in the alternative that I find the facts specially and state separately my conclusions of law in certain respects. Defendant suggests that this is required by Rule 52, Federal Rules of Civil Procedure. I do not understand Rule 52 to apply to the denial of a Rule 56 motion for summary judgment. Nor do I consider the denial of a motion for summary judgment as a dispositive decision of the sort contemplated by Rule 58. However, I now make it explicit that in denying defendant's motion for summary judgment, I find that there is no genuine issue as to the material facts set forth in defendant's proposed findings of fact (paragraphs 1, 2, 3, 4, 5 and 6), dated August 8, 1980 and filed with the clerk of court on August 11, 1980.

It is ordered that defendant's motion, filed October 1, 1980, for reconsideration of my September 11, 1980 order is denied. Defendant's alternative motion for findings pursuant to Rule 52 is denied.

Entered this 7th day of October, 1980.

BY THE COURT:

/s/ James E. Doyle

District Judge

APPENDIX D

Findings of Fact of the United States District Court for the Western District of Wisconsin, entered December 9, 1980.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

United States of America, Plaintiff,

v.

16.92 Acres of Land, located in town of LaPointe, County of Ashland, Wisconsin, William C. Brewer, Treasurer, Town of LaPointe, Ashland County, Treasurer, County of Ashland Wisconsin, Defendants.

FINDINGS OF FACT 76-C-169

Upon the basis of the entire record, including the stipulation filed herein on December 9, 1980, I make the following findings of fact:

a. The above-entitled action is a proceeding instituted by the United States of America for the purpose of acquiring by the power of eminent domain the fee simple estate in land designated as Tract No. 11-101 on Basswood Island, County of Ashland, and State of Wisconsin, containing approximately 16.92 acres of land, which land is within the boundaries of the Apostle Island National Lakeshore and more specifically described in the Complaint in Condemnation filed herein (the "Property").

b. William C. Brewer is the owner of the Property.

c. William C. Brewer acquired the Property on September 5, 1966. On September 5, 1966, the Property was in its unimproved, natural state.

d. From and after September 5, 1966, to and until July, 1968, William C. Brewer used, enjoyed and

maintained the Property in its unimproved, natural condition.

e. During July, 1968, William C. Brewer commenced the construction of a detached non-commercial, residential dwelling on the Property.

f. From and after July, 1968, to and until the present time, William C. Brewer has used, enjoyed and maintained the Property for non-commercial, residential purposes.

g. From and after September 5, 1966, to and until the present time, the use, enjoyment and maintenance of the Property by William C. Brewer has been, and is, in all respects, proper, legitimate and lawful.

h. William C. Brewer desires to be classified with, and treated like, the property owners within the boundaries of the Apostle Islands National Lakeshore, who, as a condition of the United States of America acquiring their property by the power of condemnation, have been given the benefit of the 16 U.S.C. §460w-3 election to retain a right of use and occupancy of their property.

i. On September 17, 1973, Thomas M. Kirn, the then Acting Land Acquisition Officer for the Apostle Islands National Lakeshore, wrote a letter to William C. Brewer, which states:

> This is to confirm our letter of 7 June offering $28,500 for your property; your letters of 11 June to Mr. Chester L. Brooks, Regional Director, Northeast Region; Sherman W. Swenson, Acting Chief, Duluth Land Acquisition Office and our letter of 23 July forwarding the information you requested from Mr. Brooks and Mr. Swenson.
>
> Due to the insufficiency of funds to complete the project, we find that it is necessary to adjust our outstanding offer docket and monetary ac-

count. At the present time, we must determine if eminent domain proceedings will be filed on the offers now outstanding or whether some offers will be withdrawn and used for payment to other property owners.

Would you please advise us by September 28 whether or not the offer of $28,500 is acceptable to you. In connection with this, under Section 4, (a) [16 U.S.C. §460w-3(a)], you are eligible for a retention of use and occupancy for a term of years, up to 25, or for life.

If you are interested in this retention, please advise and we will prepare a revised page 2 of the Offer to Sell Real Property that contains the standard reservation clause. The basis for payment of the reservation is a deduction of 1% of the value of the part retained from the offer of just compensation. Since the law states the owner may retain the improvements and that amount of land is (sic) reasonably necessary for the enjoyment thereof, the amount to be deducted from the $28,500 is $14 per year for each year retained. This is based on the retention of 400 ft. of frontage and all improvements.

Thank you for your prompt attention to this case.

j. The United States of America is not aware whether the advice given in the third paragraph of the September 17, 1973 letter as to William C. Brewer's eligibility to retain a right of use and occupancy of the Property reflected a deliberate waiver of the January 1, 1967 cut-off date contained in 16 U.S.C. §460w-3, or reflected a lack of knowledge on the part of the United States of America as to the date on which construction of a detached, noncommercial, residential dwelling on the Property was begun.

k. On August 12, 1980, John A. Franke, one of the attorneys for the United States of America, wrote a

letter to Walter Kuhlmann, one of the attorneys for William C. Brewer, which states:

> As you are aware, our appraisal indicated a fair market value for Mr. Brewer's property of $41,000 as of July 5, 1979. We believe the appraisal to be of excellent quality, and are prepared to proceed to trial on the basis of its analysis, updated for changes in the market since July of 1979.
>
> In order to avoid the time and expense of a trial, however, I am prepared to make the following settlement offer. Although we believe the appreciation in the Apostle Islands area has been minimal, we have not yet received an appraisal update from Mr. Anderson, and I am presently prepared to assume an inflationary increase of 10 percent and raise our appraisal figure to $45,100. In the interest of securing a settlement, I am presently prepared to offer $50,000 as just compensation for Mr. Brewer's property. We are also willing to allow Mr. Brewer to retain, at his election, either a 25-year or life estate in the improvements and most of the acreage of Tract 11-101.
>
> If Mr. Brewer elects to retain use and occupancy of the property, he will be assessed one percent of the value of the property for each year of the estate, which will be deducted from just compensation at the time of settlement. For example, if Mr. Brewer were to elect a 25-year estate, the rent would be $500 per year, or $12,500, and the just compensation payable at the time of settlement would be $37,500. If he were to elect a life estate, the rent deduction would be based on his life expectancy. If Mr. Brewer is approximately 40 years old, his life expectancy would be about 32 years, and therefore just compensation would be reduced by $16,000 at the time of settlement.

One additional comment with respect to the retention of rights to use and occupancy. The Park Service is willing to permit the retained estate to cover the entire tract, with the exception of a few hundred feet of shoreline along the tract's eastern point for the purpose of protecting and maintaining a gull nesting area. I have asked the park superintendent to determine exactly how much shoreline would be required for this purpose, but I suspect the precise boundaries of the reservation will be negotiable.

Please let me know your position on this offer as soon as possible. If you have any questions with respect to the terms of settlement, please do not hesitate to give me a call.

i. As a part of the Hearings on s. 778 before the Senate Subcommittee on Parks and Recreation of the Committee on Interior and Insular Affairs 90th Cong., First Sess. 41 (May 9, June 1-2, 1967), the following statements were made:

SENATOR NELSON. We do have condemnation for privately owned land in the bill, yes.

MR. JENSCH. It is not in this bill. The other park bills where you have had condemnation have had the specific language in there.

SENATOR BIBLE. Well, I understand the point you are making, and we have had a lot of frustrating experiences with condemnation, but if it says the words "or otherwise," that certainly is broad enough to embrace the word condemnation. I would assume that they can condemn private property in the proposed park, because if it is not provided for in this bill, it certainly should be put in. It would become ineffective if they are going to authorize a park area and not back it up with condemnation. Then you are completely frustrated. We went up and down many, many months on that in a project on the Oregon

Dunes, where we have a colleague who felt very keenly on condemnation, so if condemnation is not in here, it should be.

MR. JENSCH. Mr. Whitacre, of your staff, should be so informed, because the information he gave to us was that it was not intended to have condemnation and that Senator Nelson only wanted to have it a negotiated transaction, and upon that basis, we were proceeding and we have been misinformed I now understand.

SENATOR NELSON. That is not my position.

SENATOR BIBLE. Well, thank you very much.

MR. JENSCH. Thank you, Mr. Chairman, and members of the committee.

SENATOR BIBLE. We appreciate your effort, and your appearance here this morning. You can rest assured I am going to take a look at this problem that you present.

m. Prior to inclusion within the boundaries of the Apostle Islands National Lakeshore, the acreage within the boundaries of the Lakeshore was privately owned to the extent of 22,944 acres and publicly owned to the extent of 19,068 acres. The public owners at the time of establishment of the Lakeshore were as follows:

	Acreage
Township Lands	
Town of Bayfield	64.48
Town of Russell	32.03
County Lands	
County of Bayfield	1,366.33
State of Wisconsin Lands	16,598.60
Federal Lands	1,006.17

n. The office of the Regional Director of the Midwest Region of the National Park Service is the office primarily responsible for land acquisition policy in the Midwest Region.

o. Since 1974, the Apostle Islands National Lakeshore has been included within the territory of the Midwest Region of the National Park Service.

p. As a part of a document entitled "Environmental Assessment, Land Acquisition, Apostle Islands National Lakeshore," authored by the Acting Regional Director of the Midwest Region, when discussing the option of renegotiation with private land owners within the boundaries of the Lakeshore, said document states (at page 19):

> The National Park Service will actively renegotiate with the owners of all 40 tracts, making maximum use of authorized acquisition methods other than condemnation such as purchase, donation and exchange.

q. All parties interested directly or indirectly in the Property have been served with process as provided by law.

r. The United States of America and William C. Brewer have stipulated and agreed that the full, fair and just compensation for the taking of the Property is the amount of Sixty Thousand Dollars ($60,000), inclusive of interest, and that this sum is the fair and reasonable value of the estate taken, subject to all existing valid taxes, liens and encumbrances levied against the Property.

Entered this 9th day of December, 1980.

BY THE COURT:

/s/ James E. Doyle
District Judge

APPENDIX E.

Judgment of the United States District Court for the Western District of Wisconsin, entered December 9, 1980.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

United States of America, Plaintiff,

v.

16.92 Acres of land, located in Town of LaPointe, County of Ashland, Wisconsin, William C. Brewer, Treasurer, Town of LaPointe, Ashland County, Treasurer, County of Ashland Wisconsin, Defendants.

JUDGMENT 76-C-169

This cause comes on for judgment pursuant to the stipulations filed in this action, signed by John A. Franke, attorney for the plaintiff, United States of America, and James F. Lorimer, attorney for defendant, William C. Brewer.

Based on the entire record, including the stipulations referred to above, it is ordered, adjudged and decreed that:

1. The United States of America is empowered and has the right, pursuant to the Acts of Congress alleged in the Complaint in Condemnation and upon the duly authorized actions of officers of the United States of America thereunder, as further set out in the Complaint, to acquire the Property for public use by means of condemnation under judicial process.

2. The Property, together with all claimants and parties interested therein, are within the jurisdiction of this Court, which has power and authority to enter this judgment.

3. The plaintiff pay into the Registry of this Court the sum of Sixty Thousand Dollars ($60,000.00) as full, fair and just compensation for the Property taken, and that the Clerk of the Court shall retain in the Registry of the Court sufficient funds to pay all existing taxes, liens and encumbrances levied against Property, and that the Clerk of this Court, shall pay to William C. Brewer, the remainder of such funds on deposit.

4. Title to the Property shall vest in the United States of America on the date of deposit of just compensation in the amount of Sixty Thousand Dollars ($60,000.00) into the Registry of this Court by the United States of America as full, fair and just compensation for the acquisition of the Property, and such title is confirmed in the United States of America.

5. William C. Brewer shall retain the right to file a timely appeal from this final judgment as to the issues raised by him on his Motion for Summary Judgment in this action.

Jurisdiction of this action is retained for entry of appropriate Order and Decree.

Entered this 9th day of December, 1980.

BY THE COURT:

/s/ James E. Doyle
District Judge

Judgment entered this 9th day of December, 1980.

/s/ Joseph W. Skupniewitz,
Joseph W. Skupniewitz, Clerk
United States District Court

Opposition

Office-Supreme Court, U.S.
FILED
JUL 15 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2014

In the Supreme Court of the United States

OCTOBER TERM, 1982

WILLIAM C. BREWER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
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CAROL E. DINKINS
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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2014

WILLIAM C. BREWER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. In 1970, Congress established the Apostle Islands National Lakeshore on Lake Superior in Wisconsin as an area reserved for public enjoyment. 16 U.S.C. 460w *et seq.* In the Act creating this recreational area, Congress gave landowners of property condemned for the Lakeshore, who had begun construction of "noncommercial residential dwelling[s]" before January 1, 1967, the right to retain use and occupancy of that property for life or a term of years, at the owner's option, with the value of the retained estate deducted from the amount to be paid in compensation for the fee interest.[1] See 16 U.S.C. 460w-3.

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[1]Such provisions are "customary in most of the recreation-oriented authorizations" for the national park system. H.R. Rep. No. 91-1280, 91st Cong., 2d Sess. 6 (1970). This formula, with variations for particular parks, is commonly referred to as the "Cape Cod formula" (Pet. App. 9-11).

Petitioner owned property on an island in Lake Superior that was taken by the instant condemnation suit (Pet. App. 2). Because he had not begun to construct a residence on his property until July 1968, he was denied the option in Section 460w-3 of retaining a limited estate in the property (Pet. App. 2-3). He urges here (Pet. 7-27) that denial of this benefit due to the date when construction of his residence began violates the equal protection component of the Fifth Amendment's Due Process Clause.[2]

2. The district court (Pet. App. 18-19) correctly held that the cutoff date in Section 460w-3 must be sustained if rationally related to a legitimate governmental purpose. See *Berman* v. *Parker*, 348 U.S. 26, 35-36 (1954). Contrary to petitioner's assertion (Pet. 7-18), regulatory classifications affecting the right to use and enjoy one's property generally are not judicially reviewed under the "strict scrutiny" standard. See, *e.g.*, *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 395 (1926); *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 8 (1974); *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74, 81-85 (1980); *Hodel* v. *Indiana*, 452 U.S. 314, 331-332 (1981). Since the cutoff date in Section 460w-3 merely serves to specify the manner and extent to which the federal

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[2]Petitioner's statement (Pet. 4) that he "desires to be classified with, and treated like, property owners" who qualify for the right conferred by 16 U.S.C. 460w-3 is difficult to reconcile with his actions. As the district court found (Pet. App. 21-24), petitioner was twice offered the opportunity to retain use and occupancy of his property on the same terms available under the statute to owners of property improved before the cutoff date. Petitioner did not choose to avail himself of that opportunity. Instead, he stipulated to judgment vesting the entire property in the United States in return for the sum of $60,000 as just compensation for the taking (Pet. App. 26, 28). The court of appeals nevertheless held that petitioner has standing to challenge the statute's constitutionality (Pet. App. 7 n.5).

government is to acquire lands for a public purpose,[3] no more than a rational basis is required. See *Berman* v. *Parker, supra.*

Petitioner argues (Pet. 20-27) alternatively that the cutoff date cannot satisfy even the rational basis test. The court of appeals, however, correctly concluded (Pet. App. 15-16) that Section 460w-3 is rationally related to legitimate governmental purposes. First, it tends to soften the impact of government acquisition on persons who improved their properties well in advance of the Lakeshore's creation. Second, the possibility of a cutoff date discourages development that might be spurred by the public's awareness of a potential project and for which the government would have to pay just compensation. Indeed, the bill originally introduced by Senator Nelson in 1965 to create the Lakeshore received extensive publicity and public attention. 111 Cong. Rec. 22920-22923, 23386-23387 (1965). The Act passed in 1970 adopted a cutoff date of January 1, 1967, which, under the circumstances, strikes a reasonable balance between the interests of private landowners and those of the government.[4]

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[3]No landowners are "penalized" under the statutory scheme here involved, for all are entitled to just compensation which includes the value of any and all improvements, whether begun before or after the cutoff date. The stipulated amount received by petitioner therefore includes full compensation for his improvements to the property, which he had the opportunity to use and enjoy for more than ten years prior to the taking.

[4]While the record does not disclose whether petitioner, who purchased his property in September 1966 (Pet. App. 20), was personally aware of the Lakeshore proposal or influenced by the widely reported natural beauty of the area, the application of the congressionally determined cutoff date to him is not "wide of any reasonable mark" (Pet. App. 12, quoting *Louisville Gas & Electric Co.* v. *Coleman*, 277 U.S. 32, 41 (1928) (Holmes, J., dissenting)).

Finally, the simplicity of the cutoff date is "rationally related to the secondary objective of legislative [and administrative] convenience." *Vance* v. *Bradley*, 440 U.S. 93, 109 (1979). Since use of the cutoff date in Section 460w-3 is plainly rational, no further review of the decision of the court of appeals upholding the statute is warranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Petitioner's Reply Brief

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REPLY AND SUPPLEMENTAL BRIEFS

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REPLY BRIEF

BREWER DOES NOT LACK STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE "IMPROVED PROPERTY" CLASSIFIER ESTABLISHED BY 16 U.S.C. §460w-3, AND, THUS, THE TAKING OF HIS PROPERTY.

The Government questions (Res. Memo. at 2, n. 2) Brewer's "standing" to assert the unconstitutionality which attaches to the Government's taking of his property.

The Government ventures that it is "difficult to reconcile [Brewer's desires] with his actions", because Brewer "was twice offered the opportunity to retain use and occupancy of his property[1] on the same terms available under the statute to owners of property improved before the cutoff date." The Government reasons that, since it was not the operation of the classifier established by 16 U.S.C. §460w-3 that caused Brewer to suffer injury, but instead, his failure to "avail himself of that opportunity", he lacks "standing" to challenge its constitutionality.[2] Hardly.

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[1] Contrary to the Government's implication—"[a]s the district court found"—the District Court did *not* find that the Government offered Brewer an opportunity to elect the benefits granted by 16 U.S.C. §460w-3. Rather, at most, the District Court found only that the Government wrote two letters, offering Brewer, as a part of its proposed acquisition and settlement negotiations, the retained use and occupancy of his property. The District Court did *not* find that these proposals were in compliance with 16 U.S.C. §460w-3. That is, that either the $28,500 or $50,000 constituted the "fair market value of the property", that the 1% assessment or deduction reflected accurately the "fair market value . . . of the right retained", or that the land to be retained was that amount "reasonably necessary for the enjoyment of the dwelling." Nor, and of greater significance, did the District Court find that the Government, incident to the payment of the stipulated to $60,000, offered Brewer any opportunity to elect the benefits granted by 16 U.S.C. §460w-3. Indeed, as the Court of Appeals noted, "the Government stated at oral argument that negotiations are no longer going on between Brewer and the United States" (App. A at 7, n.5).

[2] The Government's argument can be read to say that, since Brewer has received the $60,000, he has not suffered, in a constitutional sense, any injury. Given the unique nature of the property in issue, to equate the 16 U.S.C. §460w-3 benefits afforded certain property owners with the money Brewer has received borders on the obscene. More fundamentally, in a constitutional sense, although

(footnote continued)

The Government's "opportunity" is greatly exaggerated. When reduced to its basics, because the Secretary only has such powers as have been conferred upon him by law, and must act within the scope of the granted authority, *e.g., Arrow-Hart & H. Elec. Co.* v. *Federal Trade Com.*, 291 U.S. 587, 598 (1934); *Public Utilities Commission of Ohio* v. *United Fuel Gas Co.*, 317 U.S. 456, 464 (1943), the Government's "opportunity" argument is necessarily premised on the assumption that Congress has conferred upon the Secretary discretionary authority to ignore or waive the statutorily imposed cutoff date, and grant to the owners of property on the "acquisition date", who do not meet the 16 U.S.C. §460w-3 definition of "improved property", the benefits of retention of use and occupancy.[2] The Government's "opportunity" contention stands naked. The source of the purported discretion to give or withhold the "opportunity" is not identified; the rationale is not provided; nor is authority cited.

Far from being silent, section 460w-3, by its express terms, operates to deny Brewer any "opportunity" to

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(footnote continued)
Congress was not required constitutionally to grant the 16 U.S.C. §460w-3 benefits to that certain class of property owners falling within the definition of "improved property", having elected to do so, the constitution does prohibit Congress from denying these same benefits to others, like Brewer, who are similarly situated, based solely on the manner and timing of their prior exercise of constitutionally protected activity. *Cf., Zobel* v. *Williams*, No. 80-1146, ____ U.S. ____, 50 U.S.L.W. 4613 (1982).

[3] This position flies in the face of the stance taken by the Government as to the purposes underlying the cut-off date. For instance, if such discretion exists, how does this permit "legislative [and administrative] convenience"? (Res. Memo. at 4). How is Congress to know "exactly which property will be subject to immediate and total condemnation"? (App. A to 10).

retain use and occupancy. The specific statutory language employed by Congress is clear to the conclusion that Congress did not grant the Secretary discretion to amend the legislation by doing away with or modifying the January 1, 1967 cut-off date. To adopt the Government's reading of the statute,[4] requires a judicial rewriting of the legislation, working an enlargement and extension of the scope and operation of the language beyond that which Congress intended, and providing results not contemplated by Congress.

Section 460w-3 does not stand alone, but is functionally interwoven with the Secretary's acquisition authority. It was enacted with the remainder of the legislation and was intended to qualify its operation. Section 460w-3 expressly states that "any owner or owners of *improved property* [not unimproved property] . . . may, as a *condition* of . . . acquisition [by the Secretary] . . . retain . . . a right of use and occupancy of the *improved property* . . . ." (Emphasis added.) No mechanism whatsoever is provided for the retention of use and occupancy by owners of un-

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[4] The authors of the Government's memorandum are not the first to assert semantic omnipotence:

> " 'When *I* use a word,' Humpty Dumpty said, in a rather scornful tone, 'it means just what I choose it to mean—neither more nor less.'
>
> " 'The question is', said Alice, 'whether you *can* make words mean so many different things.'
>
> " 'The question is', said Humpty Dumpty, 'which is to be master—that's all.' " L. Carroll, *Through the Looking-Glass* 130.

The Secretary does not possess lawmaking powers. He cannot extend the statute to cover that which plainly was excluded by Congress, and create an "opportunity" where, in fact, none exists.

improved property. Moreover, section 460w-3 is linked with the authorization of appropriations for acquisition under 16 U.S.C. §460w-7. As the Government acknowledges, one purpose of the retroactive cut-off date is to discourage the construction of improvements which might raise the cost of the project (Res. Memo. at 3). Likewise, the net effect of the reduction for the "fair market value . . . of the right retained", section 460w-3(a), is to reduce the acquisition costs, and, consequently, cut the dollar level of appropriates that Congress must authorize to adequately fund acquisition. Given this detailed legislative scheme for acquisition, conditioning acquisition and cutting acquisition costs, coupled with the actual amount of dollars appropriated by Congress, it cannot be said that Congress intended to confer discretion upon the Secretary to adjust unilaterally the acquisition and pricing mechanisms arrived at by Congress.

Indeed, it is highly doubtful that Congress, without raising the specter of further constitutional infirmaties, could grant the Secretary such an overbroad, vague and indefinite power as to unimproved property, while at the same time spelling out the specific details as to "improved property". That is, as to unimproved property, providing no criteria, and, thus, giving *carte blanche* authority to the Secretary to select the cut-off date, if any, and other qualifying conditions, if any, to apply on an individualized, property-by-property basis. If otherwise, what are the limits of the Secretary's discretion? What guideline(s) or standard(s), objective or subjective, is the Secretary to follow? As to unimproved property, is the Secretary bound to operate within the parameters established by section 460w-3 as to "improved property"? Under what circumstances may the Secretary choose to exercise his

discretion to give the "opportunity"; only when necessary to avoid meritorious constitutional challenge?[5]

All of this is not to say that Brewer does not desire to retain the use and occupancy of his property. Rather, it is to demonstrate that he does have "standing" to challenge the unconstitutionality of 16 U.S.C. §460w-3 as applied to him, and, thus, the Government's taking of his property.

Because the Secretary does *not* have discretion in the matter, and, thus, is powerless to cure the discrimination practiced upon Brewer, it would have served no purpose, indeed, it would have been utterly futile, for Brewer to "avail himself" of the ventured "opportunity". Brewer's failure to "avail himself of that opportunity"[6] cannot

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[5] Not surprisingly, conspicuously absent from the record is any mention of other occasions where the Secretary has chosen to exercise the asserted discretion to give owners of unimproved property the "opportunity" to elect to retain use and occupancy. Other owners of unimproved property undoubtedly would be quite surprised to discover now that, but had they inquired, the Secretary, if caught in a benevolent mood, may have given them this "opportunity".

[6] The "opportunity" rings hollow. Contrary to the Government's contention as to equality of "opportunity", Brewer was *not* "offered the opportunity to retain use and occupancy of his property on the same terms available under the statute to owners of property improved before the cut-off date." Even if Brewer had requested, and the Secretary granted, such an unauthorized "opportunity" to retain use and occupancy, such an agreement would have been unenforceable against the Government. This is because conduct out of harmony with statute is a mere nullity. Contracts made in violation of a statute are against public policy and unenforceable. Similarly, agreements which tend to injure the public confidence and trust in

(footnote continued)

deprive him of "standing" to attack the constitutionality of 16 U.S.C. §460w-3. *E.g., Glover* v. *St. Louis-S.F.R. Co.*, 393 U.S. 324, 330-31 (1969); *McNeese* v. *Board of Education*, 373 U.S. 668, 674-75 (1963); *Mont. Bank* v. *Yellowstone County*, 276 U.S. 499, 505 (1929); *Continental Can Co., U.S.A.* v. *Marshall*, 603 F.2d 590, 597 (7th Cir. 1979); *Porter Cty. Chap. of Izaak Walton League* v. *Costle*, 571 F.2d 359, 363-64 (7th Cir. 1978).

(footnote continued)

the purity and integrity of the administration and enforcement of the laws are against public policy and not binding on the Government. *E.g., Hurd* v. *Hodge*, 334 U.S. 24, 34 (1948); *Wildermuth* v. *United States*, 195 F.2d 18, 23-24 (7th Cir. 1952). Furthermore, it is settled that one who purports to contract with the United States assumes the risk that the official with whom he deals is clothed with actual authority to enter into the contract; that the United States is not bound by its agents acting beyond their authority, and that the United States is not estopped to deny the authority of its agents. *E.g., Federal Crop Ins. Corporation* v. *Merrill*, 332 U.S. 380, 384 (1947); *United States* v. *State of California*, 332 U.S. 19, 39-40 (1947). Two wrongs cannot make an "opportunity". Hence, when stripped of its verbage, the so-called "opportunity", at best, represents the chance to enter into a contract which is in violation of law and against public policy, and, therefore, unenforceable. And, for the privilege of doing so, to have the award of just compensation reduces by the "value . . . of the [unenforceable] right retained." Such a deal!!

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SUPPLEMENTAL BRIEF

Subsequent to the docketing of the Petition for a Writ of Certiorari on April 30, 1982, this Court, on June 14, 1982, decided *Zobel* v. *Williams*, No. 80-1146, ... U.S. ....., 50 U.S.L.W. 4613 (1982), to which Brewer directs the Court's attention as to the rationale advanced by the Government as justification for the allocation of benefits by means of a retrospective classifier on the sole basis of the prior exercise of constitutionally protected activity.

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